Supreme Court, U. S.
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No. 79-1537

In The
Supreme Court Of The United States

OCTOBER TERM, 1979

DIXON D. COWLEY, d.b.a. Cowley Pump & Supply,
GRAHAM L. COWLEY and HUGH H. COWLEY,
d.b.a. Cowley Bros. Supply, and
CARDER, INC. d.b.a. Ranchers Supply Company

Petitioners,

vs.

BRADEN INDUSTRIES, INC., a Delaware corporation,
doing business in the State of Arizona

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 30, 1980

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Braden Industries, Inc., Respondent, opposes the Petition for Writ of Certiorari to the United States Court

of Appeals, Ninth Circuit, filed by the Petitioners. Respondent contends the Opinion of the Court of Appeals, Ninth Circuit, contained in the Appendix to the Petition, is a correct decision which raises no considerations described in Rule 19 of this Court and which raises no issue of law of public importance and which, in fact, raises no issue properly reveiwable by a Writ of Certiorari. The considerations described by Petitioners involve only questions of fact and sufficiency thereof, and no real issue or question of law is involved. For these reasons and those stated hereafter, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Braden Industries, Inc., and specifically its Aermotor division, is a company engaged in the manufacture and marketing of water systems products, including windmills and electric water pumps and water system equipment. The Aermotor windmill was originally manufactured in 1888 and over the course of the years has become a very popular windmill and occupies a large share of the windmill market. On the other hand, the Aermotor division was a relative newcomer in the manufacture of electric water pumps and, through the use of a bifurcated distribution system, was striving to capture a greater share of that market. Braden (herein referred to

as Aermotor) implemented a system of marketing utilizing independent, exclusive distributors in certain geographical areas. In those areas where the distribution function was turned over to an exclusive distributor, Aermotor refrained from duplicating the effort and competing with a distributor within that particular locality. However, the distributor was not restricted as to the area in which he could sell, but he was subject to a Distribution Policy imposed on all independent distributors pertaining to the sale and distribution of all Aermotor products. A copy of the Distribution Policy is reproduced in the Appendix hereto.

Petitioners seek to concentrate on Aermotor's market position in windmills and totally ignore its market position in the manufacture and sale of electrical water system pumps. The entire thrust of attacking the marketing system employed by Aermotor ignores the fact that the marketing system was designed, not only to effect the sale and distribution of windmills, but also the sale and distribution of electrical pumps. The Distribution Policy adopted by Aermotor was designed, not only for more efficient promotion and distribution of all Aermotor products, but also to act as an incentive to increase its share in the electrical pump market.

In Petitioners' Statement of the Case, they raise the inference that Aermotor insured that an Aermotor

branch would be restricted to the extent that it would not sell Aermotor products, either to dealers or at retail, within the territory of an authorized distributor. However, it should be borne in mind that Aermotor branches are but a mere arm of Aermotor itself, they are not separate entities. The bifurcated system of marketing employed by Aermotor is merely one of turning over to independent distributors in certain geographical locations the functions of a distributor, the consideration for which Aermotor would not duplicate the distribution functions within that area. The purpose of the system was to promote interbrand competition by insuring to a distributor that he would reap the benefits of his investment within a particular area. The Petitioners ignore the fact that Aermotor distributors handle all Aermotor products and not merely windmills. The Aermotor distribution policy did not prohibit an independent distributor from selling outside of his area of primary responsibility but did impose one burden upon a distributor. The trial court and the appellate court found this restriction was for the purpose of discouraging "shirttailing" with the basic ultimate purpose to create and operate an effective and efficient system of marketing all of the Aermotor products throughout the United States, and thus stimulate interbrand competition.

The evidence in the trial court was clear that at no time did either Petitioners Cowley or Carder attempt to, or in fact compete with Aermotor in the wholesale sale of windmills or any product within an area adjacent to where they were doing business. The plain fact was that neither Petitioner Cowley nor Carder was ever a wholesale competitor with Aermotor.

The trial court issued two Opinions in this case, both of which are accurately reported in the Appendix to Petitioners' Petition. Every factual determination in those Opinions is sustained by ample evidence which in many instances is cumulative in nature. Petitioners, after losing the case in the trial court on all points, appealed to the United States Court of Appeals, Ninth Circuit, seeking reversal. Petitioners attempted to retry the case on appeal *de novo*, asserting reasons why the trial judge perhaps should have ruled to the contrary, but they raised no significant legal considerations. After full briefing and argument, the Court of Appeals rejected Petitioners' claims and affirmed the trial court on all counts. A Petition for Rehearing With Suggestion of Rehearing *en banc* was filed, and, in due course, the appellate court denied that Petition. The Mandate from that court was issued and filed in the United States District Court for the District of Arizona, at which time the United States Court of Appeals, Ninth Circuit, lost

jurisdiction to hear future matters. After the Mandate was issued, Petitioners filed their Petition for Writ of Certiorari in this case. Accordingly, it is questionable whether jurisdiction in this Court is proper once the Mandate has issued.

ARGUMENT

REASONS WHY WRIT SHOULD NOT ISSUE

This Court has stated on numerous occasions that certiorari should not be granted except in cases involving principles, the settlement of which is important to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeal.

THE PETITION FAILS TO SET FORTH CONSIDERATIONS PRESCRIBED IN RULE 19

Rule 19 of this Court, while not fully measuring the Court's discretion, sets forth the character of the reasons which will be considered in a review on Writ of Certiorari. Additionally, the rule re-emphasizes that certiorari is not a matter of right, but one of sound judicial discretion, and will not be granted except where there are special and important reasons. It is submitted that the Petition does not set forth any of the enumerated reasons and certainly does not raise any

principles of importance to the public nor any special and important reasons. There is no allegation that the Ninth Circuit Opinion is in conflict with opinions of other Courts of Appeal nor that such Opinion fails to follow the principles enumerated in this Court in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). In fact, the argument set forth in the Petition more nearly reflects an attempt to appeal the decision of the trial court for a second time, as opposed to setting forth reasons why a Writ of Certiorari would be proper under Rule 19. Numerous references are made to the transcript on appeal, which is not before this Court, as well as various trial exhibits, and an effort is made, once again, to retry, on appeal, the issues decided by the trial court. A second appeal is not a proper ground for issuing a Writ of Certiorari.

REVIEW OF PETITIONERS' PROPOSITIONS

Petitioners raise two basic propositions for their reasons why a Writ should issue. The first deals with territorial restraints under §1 of the Sherman Act, while the second deals with monopolization under §2 of the Sherman Act. In the first proposition, Petitioners raise five alleged errors, none of which constitutes a ground for issuing a Writ of Certiorari under Rule 19. Briefly, however, Respondent will deal with each of the five points.

Petitioners' Proposition I

Petitioners' First Contention

The trial court concluded that the distribution system employed by Aermotor was to be tested by the rule of reason and was not to be considered *per se* unlawful. The trial court relied upon the Ninth Circuit Opinion of *GTE Sylvania, Inc. v. Continental TV, Inc.*, 537 F.2d 980 (9th Cir. 1976), *aff'd* 433 U.S. 36 (1977). All of the evidence before the trial court dealt with the reasonableness of the Aermotor marketing policy, and Petitioners adduced no evidence as to whether the marketing policy was unreasonable nor what effect, if any, it would have on either interbrand or intrabrand competition. Petitioners based their entire case upon the doctrine of *per se* liability announced in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), which was reversed by this court. The trial court had before it the "credible and uncontradicted expert marketing testimony of Dr. Hamm" to the effect that the marketing policy employed by Aermotor was, indeed, reasonable. (Trial Court Second Opinion, p. 7). The trial judge carefully examined the *Sylvania* decision and enumerated the various factors which led him to believe that the marketing policy was not an unreasonable restraint of trade. He reviewed specifically the *purpose* of the policies, the *alternatives* and the *competitive impact*

upon the market place. The marketing policy was found to apply not only to the marketing of windmills, but to all of the various Aermotor products. Further, the trial court found that *Sylvania* required that vertical restrictions must be judged on an individual basis for reasonableness. (Trial Court Second Opinion, p. 5). Petitioners' First Contention is without merit.

Petitioners' Second Contention

Contrary to Petitioners' viewpoint as to the purpose of the antitrust laws, it is clear that the antitrust laws are designed to protect competition, not specific competitors. *See Brunswick Corp. v. Pueblo Bowl O Mat, Inc.*, 429 U.S. 477 (1977). Petitioners' Second Contention ignores the effect on competition as a whole and focuses only on the particular effect that a policy may have on a particular competitor. The trial court and the appellate court reviewed the competitive impact of the policy in question from the standpoint of overall competition and not with any particular reference to the Petitioners. The competitive effect of the policy in question must be judged on a level of competition between Aermotor and its competitors. If not viewed from such competitive effect, then the entire system of competition could break down; hence, there would be no further competition at that level. Petitioners' comment in their footnote at page

10 of the Petition is answered by noting that they failed to meet their burden of proof. (*See Cowley v. Braden Industries, Inc.*, 1980-1 Trade Cas. ¶63, 134 at p. 77, 659).

Petitioners' Third Contention

Related to the Second Contention, the Third Contention overlooks the level of competition from which a particular marketing practice must be viewed. In analyzing the marketing practice employed by Aermotor, one must look to *interbrand* competition. If a manufacturer cannot maintain a reasonable share of a market, then that manufacturer, of necessity, will go out of business, thus reducing interbrand competition. As mentioned previously, the antitrust laws are designed to encourage and protect competition and not necessarily competitors. Further, Petitioners failed to show any adverse effect on interbrand competition caused by the Aermotor marketing policy. As noted by the trial court and the Court of Appeals, this was their burden, and this burden they failed to fulfill. To the contrary, Respondent proved that the marketing policy had a beneficial effect on interbrand competition, and there were no acknowledged adverse effects on intrabrand competition in evidence before the trial court.

Petitioners' Fourth Contention

The trial court found no willful acquisition nor any purposeful maintenance of a monopoly at either the manufacturing level or the distribution level. The court found that the large market position of Aermotor in the windmill market was because they had a better product that was accepted by the public and also as a result of attrition of other manufacturers in the windmill market. Clearly, Aermotor had no large market share in the electric pump market. At the distribution level, Cowley was not replaced by a branch or by an Aermotor-owned operation, but he was replaced by another independent distributor. There was no evidence that Aermotor, with its large share of the market in windmills, attempted to take over the entire distribution of its own products. The Petitioners' evidence and all of the evidence showed that the Aermotor windmill was "a better mousetrap." (Trial Court First Opinion, p. 8). Further, there was no evidence of the use of any monopoly power for an unlawful purpose. Petitioners contend that intrabrand competition should control, citing footnote 19 to this Court's Opinion in *Sylvania, supra*, but a reading of that footnote indicates that interbrand competition is the competition among manufacturers of the same generic products and is the *primary concern* of the antitrust laws. Any effect upon intrabrand competition is

secondary in consideration to the effect on interbrand competition.

Petitioners' Fifth Contention

Having failed in their burden of proof as to the unreasonableness of the Aermotor marketing policy, the Petitioners concocted an eleventh hour approach that the vertical restraint was now a horizontal restraint and hence a *per se* violation. However, the evidence is unchallenged that the Petitioners never engaged in any horizontal competition with Aermotor, and, therefore, there could not be any horizontal relationship between the parties. This the trial court concluded. Petitioners contend that the trial court's Opinion is at "odds" with other authority, citing *Pittsburgh v. PEPI, Inc.*, 531 F.2d 91 (3rd Cir. 1975), but that case applied a *per se* doctrine to a vertical restriction wherein the manufacturer attempted to police the vertical division of markets for the benefit of horizontal competition. They also cite *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979), which again was a vertical restraint to enforce horizontal restraints among competitors. They also cite *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979), which involved an agreement among competitors. They also cite *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y. 1969), *aff'd*

per curium 417 F.2d 621 (2nd Cir. 1969). The *Interphoto* case was a pre-*Schwinn* case and involved restrictions among competitors which were truly horizontal in nature. In short, none of the cases cited by Petitioners is applicable to the facts in this case. There was no evidence to support Petitioners' contention that a horizontal relation existed. In any event, this is another attempt to retry a fact situation for a second time on appeal, and is not a proper ground for review by certiorari.

Petitioners' Proposition II

Monopolization Under §2 of the Sherman Act

Under this proposition, Petitioners suggest that this case presents an opportunity to review conduct *potentially* violative of the federal antitrust laws. Clearly, a potential violation of the antitrust laws raises no issue properly reviewable under Rule 19 of the rules of this Court. A potential violation, if indeed there is one, is not an acutal violation, nor is it an actual justiciable cause which would raise special important reasons for review by this Court upon a Writ of Certiorari. A potential violation does not raise any conflict among the circuits, nor should any potential violation be of any interest to this court. Petitioners raise the issue that the trial court and the appellate court

made a finding of lack of "predatory conduct or intent" and make the conclusion that this is the only reason upon which the Petitioners' claim for monopoly failed in the trial court and upon appeal. That is not correct.

Both the trial court and the appellate court followed the rule set forth in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) and found there was no willful acquisition or maintenance of a monopoly nor was there any use of monopoly power for an unlawful purpose. The Court found there was no use of monopoly power to foreclose competition, to gain a competitive advantage or to destroy a competitor. *See U. S. v. Griffith*, 334 U.S. 100 (1948). In addition, the trial court went on to find that there was a lack of competition between the Petitioners and this Respondent, and, therefore, they had no standing to maintain the claim under §4 of the Clayton Act. Further, the appellate court found Petitioners failed to meet their burden of proof under the *Grinnell* test.

The phrase "predatory conduct or intent" should be equated to "willful acquisition or maintenance" of a monopoly. Whether conduct is described as "predatory," "exclusionary," "coersive" or "not honestly industrial," all such labels are descriptive of willful or intentional conduct. There is no conflict among the circuits as to the use of this term. The cases cited by Petitioners in this regard are cases from within the Ninth Circuit, and

that is not a ground for review by certiorari. Moreover, the cases cited do not stand for the proposition for which Petitioners would suggest. For example, *Purex Corp. v. Proctor & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979) recognizes the concept of predatory conduct. The quoted portion from *Greyhound Computer Corp. v. IBM*, 559 F.2d 488 (9th Cir. 1977) does not support Petitioners' contention. The court in that case said if IBM possessed a monopoly power, then IBM would be precluded from employing otherwise unlawful practices in furtherance of that power. In other words, it was a question for the jury whether the use of monopoly power was for an unlawful purpose. The trial court in this case found that the use of Aermotor's market position was not for an unlawful purpose.

In addition, the trial court found Aermotor's windmill market position was due to having a superior product and attrition of other windmill manufacturers during World War II. (Trial Court First Opinion, p. 8). Therefore, Aermotor's market position was the result of growth and development as a consequence of a superior product, and historic accident. See *U.S. v. Grinnell Corp.*, *supra*. This case has not been tainted with an emphasis on predation.

Petitioners cite *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F.2d 263 (2nd Cir. 1979). That case

has absolutely no application to the case in question. That case involved an attempt by one having a large market position to exert that market postion to increase its market position in an unrelated or different product. In other words, that case involved the use of monopoly power to gain competitive advantage. The trial court expressly found no such use in this case. Once again, however, this was a factual determination sustained by the appellate court on appeal, and now is not the proper subject of review by this Court under Rule 19. The issues involved in this case and the *Berkey* case, as indeed all cases cited by Petitioners, are distinguishable from the propositions raised in this proceeding.

Petitioners' Proposition II, like Proposition I, does not deal with any consideration suggested by Rule 19 governing review on certiorari.

CONCLUSION

In summary, the Petitioners have failed to raise any contention which would warrant review by this Court on certiorari. There is no contention that the Court of Appeals, Ninth Circuit, has rendered a decision in conflict with a decision of another Court of Appeals on the same matter, nor that it has decided an important question of federal law which has otherwise been settled by this Court. In essence, the Petitioners seek to have a

second appeal upon factual issues which were thoroughly considered by the Court of Appeals. The last minute argument pertaining to "predatory conduct or intent" was not even raised before the Court of Appeals. The Court of Appeals reviewed all of the facts in the record on appeal as applied to the law and concluded that the trail court's decision was not clearly erroneous and should be upheld. Petitioners have not raised any issue or principle of importance to the public. Petitioners' request that this Court review conduct "potentially" violative of federal antitrust laws is insufficient. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondent, Braden Industries, Inc., a member of the Bar of this Court, hereby certifies that on the 30th day of April, 1980, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States, caused three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to be deposited in the United States Mails at Tulsa, Oklahoma, with first class postage prepaid, addressed to the following counsel of record as follows:

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Attorneys for Petitioners

Roger R. Scott

APPENDIX

APPENDIX

TO: All Branch Managers, Salesmen, Manufacturer's Representatives and Distributors

FROM: James E. Fetters
Marketing Manager

SUBJECT: SALES POLICY

A statement of policy was issued May 23, 1969, which was Aermotor policy before the statement was issued and continues to be Aermotor policy.

> Under no circumstances does Aermotor condone the Conditioning of the sale of windmills on the sale of pumps. We do, however, place our main emphasis on the sales of pumps and when sales of pumps conflicts with the sales of windmills, the pump sales take precedent over the sales of windmills in selecting a market outlet.

The following restatement of policy also seems to be in order:

> Aermotor will not knowingly ship pump and/or windmill merchandise from Aermotor stocking points into the territory of an exlcusive distributor without an order or consent from the distributor with whom we have an agreement for the territory.
>
> Aermotor customers are free to sell and/or ship Aermotor merchandise from their stock in their

territory as they may see fit so long as they do not violate their agreement by actively soliciting business outside their assigned territory.

AERMOTOR

s/ J. E. Fetters